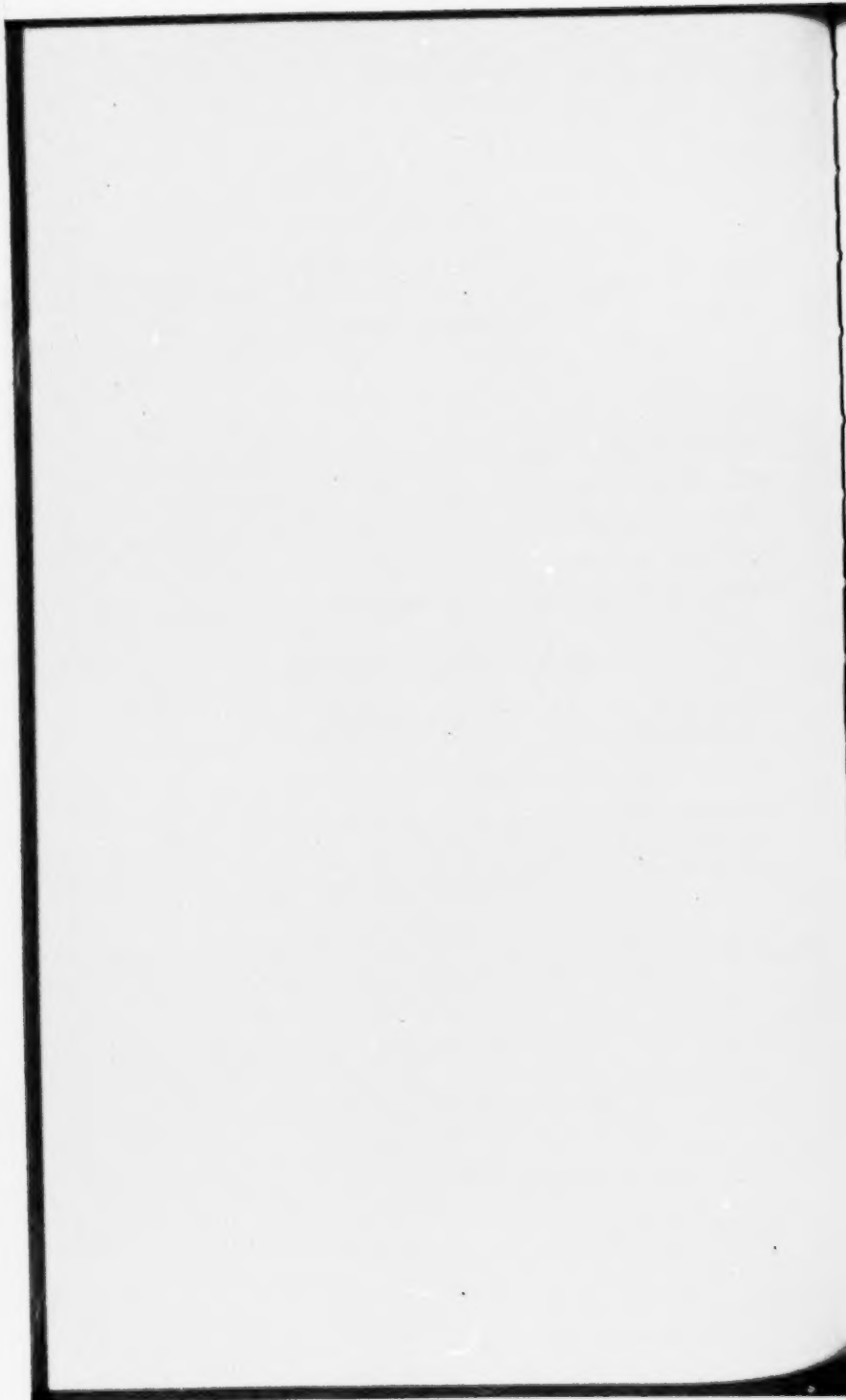


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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1947

No. _____

CALCASIEU PAPER COMPANY, Inc.,

Petitioner,

vs.

CARPENTER PAPER COMPANY,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

*To the Honorable Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Petitioner prays that a Writ of Certiorari issue to review a judgment of the Circuit Court of Appeals for the Fifth Circuit entered herein on December 5, 1947, (Petition for Rehearing denied January 7, 1948) reversing a judgment of the District Court of the United States for the Northern District of Texas.

OPINION BELOW

The opinion of the Court below filed December 5, 1947, is reported in 164 Federal, (2d), Page 653, and is contained in the record in this Cause. (R. 124).

BASIS OF JURISDICTION

Jurisdiction is invoked under Section 240(a) of the Judicial Code as amended, (28 USCA, Section 347) and under Supreme Court Rule 38, Section 5.

QUESTIONS PRESENTED

The controlling questions presented in this Petition are:

- (1) Whether a contract for the purchase and sale of paper deliverable over a period of a year beginning January 1, 1946, at the maximum price therefor fixed by the Office of Price Administration became ineffective for want of a price standard after June 30, 1946, when the Emergency Price Control Act, and the regulations and price schedules promulgated thereunder, ceased to exist.
- (2) Whether the reenactment of a Price Control Act by Congress on July 25, 1946, operated retroactively to revive a contract for the sale of paper which had theretofore expired for want of a standard by which to determine the prices to be paid for the paper.
- (3) Whether Congress had the power to revitalize a contract that had expired by providing in the Price Extension Act that all regulations, orders, price schedules and requirements under the Emergency Price Control Act of 1942, as amend-

ed, which were in effect on June 30, 1946, should be in effect in the same manner and to the same extent as if the Extension Act had been enacted on June 30, 1946.

- (4) Whether Congress and the Courts may revive and enforce contractual obligations and liabilities of private parties under a contract that has ceased to exist because of the failure of a price standard, an indispensable element, where the Government has no interest in the contract.

STATEMENT OF FACTS

Petitioner brought this suit in the District Court of the United States for the Northern District of Texas to recover \$33,417.05 due on invoices for paper sold and delivered to Respondent in June, 1946. Respondent, in an Amended Answer in effect admitted the correctness of Petitioner's claim, but sought to offset this claim by a Counterclaim for damages in which it was alleged that in December, 1945, a contract was entered into between Petitioner and Respondent under the terms of which Petitioner agreed to sell and deliver to Respondent 2500 tons of Kraft paper during the year 1946 at the maximum price allowed and permitted by the regulations of the Office of Price Administration; that the contract was performed to and through June 1946. (R. 81) Petitioner moved to Dismiss the Amended Counterclaim for failure to state a claim

upon which relief could be granted (R. 93) which Motion was sustained by the District Judge on the ground that inasmuch as the only price basis was the maximum at which Kraft paper might be sold under schedules adopted by the Office of Price Administration, the contract became ineffective and unenforceable against either party when the Price Control Act and the regulations and schedules promulgated thereunder expired on June 30, 1946. Judgment was rendered in favor of Petitioner (R. 99) from which an appeal was prosecuted to the Circuit Court of Appeals where the judgment of the Trial Court was reversed.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. Important questions of Federal Law are here involved which have not been decided by this Court; for example, the effect on then existing contracts of the expiration of the Price Control Act on June 30, 1946, and the regulations and schedules promulgated thereunder, and the subsequent enactment of the Price Control Extension Act on July 25, 1946, where the price standard of the commodity involved was the maximum price fixed by the Office of Price Administration.

2. The effect of the retroactive provision of the Price Control Extension Act of July 25, 1946, on private rights and immunities accrued during the period from June 30, 1946, to July 25, 1946, a question posed, but not decided in *Fleming v. Rhodes*, (No. 682), 331 U. S.

100. The question is important in view of the uncertainty and confusion existing in respect to the many situations similar to the one involved in this suit.

3. Because of the conflict between the decision in this case and that of *Ross Lumber Company, v. Hughes Lumber Company*, (5 Cir.), 264 Fed. 757, which involved a contract for the purchase and sale of lumber at a price established by Shuster's Concession Sheet issued semimonthly when the contract was executed. On June 10, 1918, the Government fixed a maximum price at which lumber of the class covered by the contract could be sold commercially. Publication of the Concession Sheets was thereupon discontinued. The Court held that the Criterion upon which the price of the commodity to be delivered, a necessary term of the contract, having ceased to exist without fault of either of the parties, either party could refuse to be further bound by the terms of the contract, and damages could not be recovered for failure to perform.

4. Because the decision in the instant case is in conflict with the decision of the Sixth Circuit in *Louisville Soap Company v. Taylor, et al*, 279 Federal 470, involving a contract for the purchase and sale of resin. The price of the resin was to be based on the official closing Savannah, Georgia, Market on date order was received by the seller. During the life of the contract there ceased to be any official closing Savannah, Georgia, Market before the contract had been fully performed, whereupon the purchaser declined to accept further shipments. Suit for damages for breach of con-

tract followed. The Court held in such a situation that the buyer and seller are released from their obligation under the contract. In the instant case not only did the Price Control Act and the regulations and schedules expire on June 30, 1946, by the terms of the Act, but the schedules on Kraft Paper were canceled outright on November 10, 1946, by Supplemental Order 193 of the Administrator as shown by Federal Register, Volume 11, No. 222, at Page 13464.

5. Because the decision in this case is in conflict with the decision of the Sixth Circuit in *Canadian National Railway Company vs. Jones Company*, 27 Federal 2d, 240, which involved a contract for the purchase and sale of 150,000 tons of run-of-mine coal from the Hocking District, deliveries to commence April 1, 1922, and to be continued in installments throughout the ensuing year at the same price as paid to seller by other railroads on contracts for mine-run coal from the Hocking District at the time the contract became effective.

On April 1, 1922, the effective date of the contract, the Coal Company had no contracts in force with other railroads due to a general strike of coal miners. This strike continued until August, 1922. In a suit involving the contract the Court held that the method and means for fixing the price having failed, the provision as to price became ineffective and inoperative, and the contract therefore became unenforceable by reason of the indefiniteness of this important element.

The decision of the Circuit Court of Appeals in this case is obviously in conflict with the cited cases on an important and constantly recurring question of contract law, and, unless corrected by this Honorable Court, will inevitably result in confusion and further conflicts.

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari issue out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Fifth Circuit commanding that Court to certify and send to this Court for its review and determination a full and complete transcript of the record and the proceedings of the said Court of Appeals had in this case, to the end that this case may be reviewed and determined by this Court, as provided by law; and that the judgment of said Circuit Court of Appeals be reversed with appropriate directions by this Court, and that Petitioner have such other and further relief in the premises as this Honorable Court may deem proper.

CALCASIEU PAPER COMPANY, INC.

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In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1947

NO. _____

CALCASIEU PAPER COMPANY, INC.

Petitioner

CARPENTER PAPER COMPANY,

Respondent

**BRIEF IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI**

CALCASIEU PAPER COMPANY, INC.

By: WILLIAM E. ALLEN

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I

OPINION OF THE COURT BELOW

The opinion of the Circuit Court of Appeals is reported in 164 Fed. (2d), p. 643, and a copy appears in the record (R. 124).

II

JURISDICTION

Jurisdiction is invoked under 240 (A) of the Judicial Code, as amended, (28 USCA, Section 347), and under Supreme Court Rule 38, Section 5).

III

STATEMENT OF THE CASE

Statement appearing on Pages 3-4 of the Petition for Writ of Certiorari is here adopted and made a part of this brief.

IV

SPECIFICATIONS OF ERRORS

1. The Circuit Court of Appeals erred in reversing the judgment of the District Court.
2. The Circuit Court of Appeals erred in holding that the Amended Counterclaim of Respondent stated a valid claim.

3. The Circuit Court of Appeals erred in holding that the contract pleaded by Respondent as the basis for a Counterclaim did not become inoperative and unenforceable on June 30, 1946, when the Price Control Act and the regulations and schedules promulgated thereunder expired, the prices so fixed being, according to Respondent's allegations, the only price standard agreed upon.

4. The Circuit Court of Appeals erred in holding that the enactment of the Price Control Extension Act on July 25, 1946, restored and revitalized a contract which had become void for want of a price standard when the Emergency Price Control Act, the regulations and schedules thereunder ceased to exist by the very terms of the Act.

4. The Circuit Court of Appeals erred in holding that pursuant to regulations made under the terms of the Emergency Control Act of 1942, as amended on June 30, 1945, a definite standard of measurement was set and definite prices were fixed for the whole of the year 1946, notwithstanding the fact that the Act under which the regulation was made expired by its own terms on June 30, 1946, as did all regulations made pursuant thereto.

5. The Circuit Court of Appeals erred in holding that in considering a Motion to Dismiss, all allegations of the Counterclaim must be taken as true, and in further holding in that connection that pursuant to official regulations of the O. P. A. a definite standard of meas-

urement was set and definite prices were fixed for the whole of the year 1946, for the reason that the allegations upon which such conclusion was reached by the Appellate Court were mere legal conclusions of the pleader which were not admitted by the Motion.

V

BRIEF OF ARGUMENT

The Circuit Court of Appeals holds that in passing upon the Motion to dismiss the allegations of the Counterclaim must be taken as true, and says that the argument of Petitioner "overlooks that the Counterclaim flatly and unequivocally alleged that the Office of Price Administration established a price for the whole of the year, and there is neither pleading nor proof to the contrary,"—and concludes, therefore, that pursuant to the O. P. A. regulation a definite standard of measurement was set and definite prices were fixed for the whole of the year 1946. The allegation referred to is a plain conclusion of law, and an erroneous one, at that. In *Green v. Brophey*, 110 Fed. (2d) 539 the Circuit Court of Appeals for the District of Columbia, speaking through Justice Vinson, said:

"It is familiar learning that allegations as to matters of law are not admitted on a motion to dismiss."

The wholesomeness of that Rule is demonstrated by the facts in this case. The regulation fixing a maximum price of the paper here in question existing in Decem-

ber, 1945, when the contract was made, ceased to exist when the Price Control Act expired on June 30, 1946, and the regulations adopted pursuant to the Act of July 25, 1946, were cancelled by an Order dated November 10, 1946, so far as paper was concerned. (Federal Register, Vol. II, Page 13464.) Taking judicial notice of the Statute and pertinent orders of the Administrator, as was his duty, the District Judge declined to accept the legal conclusion in the Counterclaim that a price of Kraft paper was established for the whole of the year 1946. He further accepted as correct and followed the holding in such cases as *Ross Lumber Company v. Hughes Lumber Company*, 264 Fed. 757, (Certiorari denied) 254 U. S. 635, *Louisville Soap Company v. Taylor*, et al, 279 Fed. 470 (Certiorari denied) 259 U. S. 583; and *Canadian National Railway Company v. Jones Company*, 27 Fed. (2d) 240, such holding being well stated in the Taylor case as follows:

“Where there is a contract to sell goods at a price, or on terms, to be fixed by a third person, this express condition qualifies the obligations of both buyer and seller; and where such third person, without fault of the seller or the buyer, cannot or does not fix the price or terms the seller is released from his obligation to sell and deliver, and the buyer is released from his promise to accept and pay. This doctrine has been universally applied by the Courts not only to contracts of sale, but to many other forms of contract, and it has also been written into the Uniform Sales Act adopted by many states of the Union. Therefore, the mo-

tion of the defendant for a directed verdict as to plaintiff's cause of action should have been sustained."

and in the Ross Lumber Company case in this language:

"The criterion upon which the price of the commodity to be delivered by the defendant to the plaintiff, a necessary term of a binding contract, thus, without a fault of either of the parties, ceased to exist, and either party could refuse to be further bound by the terms."

The Circuit Court of Appeals in the instant case declined to follow the last three cited cases saying that they are not at all in point.

We most earnestly contend that the decisions mentioned are in point, and that the holding of the Circuit Court of Appeals in this case is in direct conflict with those cases on an important question of contract law.

In discussing Petitioner's argument on this point, the Circuit Court of Appeals further says: "It unwarrantably disregards the reenactment of the Act and the restoration of the O. P. A." This is an implied, if not a

direct, holding that the retroactive provisions of the Extension Act of July 25, 1946, are valid and sufficient to revitalize a contract that was legally dead. This hold-

ing brings squarely before this court a constitutional question left open in *Fleming v. Rhodes*, 331 U. S. 100. May Congress and the Courts revive and enforce contractual obligations and liabilities of private parties that have ceased to exist where the public has no interest? The importance of this question is readily apparent.

Respectfully submitted,

CALCASIEU PAPER COMPANY, INC.

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